STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DEBRA A. DAVIS, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 724, Respondent.	Case No. LA-CO-1448-E PERB Decision No. 2208 October 6, 2011

Appearances: Debra A. Davis, on her own behalf; California School Employees Association by Sonja J. Woodward, Attorney, for California School Employees Association & its Chapter 724.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Debra A. Davis (Davis) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the California School Employees Association & its Chapter 724 (CSEA) breached its duty of fair representation under the Educational Employment Relations Act (EERA)[1] by failing to adequately assist Davis in processing various complaints concerning her employment with the San Diego Unified School District (District). The Board agent found that the charge failed to state a prima facie violation of the duty of fair representation.

The Board has reviewed the dismissal and the record in light of Davis's appeal, CSEA's response thereto, and the relevant law. Based on this review, we find the dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance

[1] EERA is codified at Government Code section 3540 et seq.

with applicable law. Accordingly, the Board adopts the dismissal and warning letters as the decision of the Board itself, supplemented by the discussion below.

Compliance with Requirements for Filing Appeal

Pursuant to PERB Regulation 32635(a),[2] an appeal from dismissal must:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*State Employees Trades Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635(a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381 (*Pratt*); *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *United Teachers - Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635(a). (*Pratt*; *State Employees Trades Council*; *Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

The appeal in this case merely restates facts alleged in the original charge that CSEA failed to process Davis's complaints in the manner she desired, changed representatives during

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

a mediation session, and met with the District during the mediation outside her presence. It fails, however, to reference any portion of the Board agent's determination or otherwise identify the specific issues of procedure, fact, law or rationale to which the appeal is taken, the page or part of the dismissal to which appeal is taken, or the grounds for each issue. Thus, it is subject to dismissal on that basis. (*City of Brea* (2009) PERB Decision No. 2083-M.)

New Evidence and Allegations on Appeal

In her appeal, Davis presents new evidence and raises new factual allegations that were not presented in the original charge. The evidence and allegations all relate to her claims that CSEA breached its duty of fair representation by failing to adequately assist her in resolving her workplace issues. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.) On February 17, 2011, the Board agent issued a letter advising Davis that the charge failed to state a prima facie case and warning her that the charge would be dismissed unless she amended the charge to state a prima facie case. Davis filed an amended charge on March 9, 2011. Thereafter, the Board agent dismissed Davis's amended charge on March 29, 2011. Davis filed an appeal from dismissal on June 13, 2011. Attached to the appeal are documents provided for the first time on appeal that are either undated or bear dates that all predate the dismissal. The appeal provides no reason why they could not have been alleged in the original charge or in an amended charge. Thus, we do not find good cause to consider these new allegations and evidence.

ORDER

The unfair practice charge in Case No. LA-CO-1448-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member McKeag joined in this Decision.

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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Telephone: (818) 551-2804
Fax: (818) 551-2820

March 29, 2011

Debra Davis

Re: *Debra Davis v. California School Employees Association & its Chapter 724*
Unfair Practice Charge No. LA-CO-1448-E
DISMISSAL LETTER

Dear Ms. Davis:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 3, 2010. Debra Davis (Davis or Charging Party) alleges that the California School Employees Association & its Chapter 724 (Union or Respondent) violated section 3543.6(b) of the Educational Employment Relations Act (EERA or Act)[1] by breaching the duty of fair representation. Davis also alleges other violations by the Union.

Charging Party was informed in the attached Warning Letter dated February 17, 2011, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to February 25, 2011, the charge would be dismissed. After receiving an extension of time, you filed an amended charge on March 9, 2011.

The following is a summary of the facts alleged in the amended charge.

On May 12, 2005, Davis contacted Union representative Ethel Larkins regarding a complaint Davis had concerning her supervisor at the San Diego Unified School District (District). Davis explained the situation and Larkins met with other, unspecified individuals involved in Davis's dispute with her supervisor. Davis alleges that, during meetings with some of the people involved, Larkins would state beforehand that she would approach the meeting one way and then take a different approach during the actual meeting.

Davis requested that Larkins file a grievance over her dispute with Davis's supervisor. Larkins requested that Davis draft a letter specifying her complaints. Davis did so on May 16, 2005.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

On June 20, 2005, Davis received a response to her letter from the District. Davis does not provide the contents of the response, but Davis concluded that the District did not wish to address the complaints further. Larkins did not inform Davis whether there was an opportunity to pursue her concerns further.

In June 2006, Davis was approached by Union job steward Derrick Howard. Howard made what Davis described as unwelcome "sexual advances" toward Davis. Howard suggested that he could assist Davis if she assented to his advances. Davis stated that she would report the incident to the Union.

Davis informed Larkins of Howard's comments. Larkins stated that she would address the matter. Larkins spoke with Howard about the encounter. Larkins did not inform Davis whether she would request some type of investigation over Howard's actions.

Davis requested to be reassigned to another location away from Howard but the District denied Davis's requests. In June 2006, Davis approached Union representative Leticia Munguia to discuss her situation. Munguia requested that Davis again put her concerns into a letter and to prepare a request for a formal grievance.

Davis then states:

> Ms. Munguia's efforts only afforded me a forum with my supervisors Mrs. Rumrill, Mrs. Jan Wendt, Area Manager, and Mrs. Lynn Mercedo, Site Manager, along with Union Job Steward Rep. Larry.
>
> Nothing positive came from the forum; all of my complaints and concerns were not given any validity, and I left again feeling frustrated and unresolved.

Based on these allegations, it appears as though the matter was not resolved to Davis's satisfaction.

In August 2007, the District accused Davis of stealing water and placed her on administrative leave. Davis then alleges that she "constantly appeal [sic] to my Union Representatives concerning my plight; but to no avail. It was as if they did not hold my rights as a Union member in high regards and at the time I didn't know why."

In September 2007, the District informed Davis by letter that it had some concerns about her employment and that it had the right to order her to submit to a fitness for duty examination before a physician or a psychologist. The District stated that if Davis did not submit to the examination, by September 30, 2007, the District would terminate her employment.

Davis contacted the Union about the District's letter. Davis spoke with Larkins and another Union representative, Larry Isom. Davis explained her belief that the District has been trying

to characterize her as unstable in an attempt to make the workplace uncomfortable. Larkins and Isom informed Davis that if Davis refused to take the fitness for duty examination, the District could terminate her employment. Davis does not specify whether she underwent a fitness for duty examination.

In October 2009, the District informed Davis that she was being transferred to a different school site to determine whether she could perform the duties of another classified position. District representative Etta Elliot informed Davis that the position she was transferring into was temporary.

On Davis's first day of her new assignment, Elliot informed Davis that she would only instruct Davis how to perform the job functions of the position one time. Elliot also instructed other employees not to assist Davis.

Davis contacted Larkins to seek Union assistance. Larkins attempted to appoint Howard to assist Davis with the situation. Davis complained to Munguia and the Union instead appointed Aminah Walker to assist Davis. Walker informed Davis that Munguia instructed her not to take Davis's complaints too seriously because Davis was mentally unstable. Although not entirely clear, it appears as though Walker set up meetings with the District.

On June 30, 2010, Munguia attempted to replace Walker with a different representative handling Davis's complaints, but Davis refused to allow this to happen. Davis and Walker attempted to contact Munguia for assistance with preparing for a scheduled mediation session. Munguia did not respond.

When Davis and Walker arrived for the mediation, Munguia was already at the mediation holding a discussion with the District. During the meeting, Munguia stated that Walker was no longer a job steward and that she did not have the authority to act as a Union representative. Davis discovered at this meeting that the Union did not previously file grievances on Davis's behalf. Rather, the Union only pursued resolution of the Davis's complaints through informal discussions with the District. It is unclear whether the mediation was part of the grievance process or whether it was part of some kind of other dispute resolution mechanism.

On February 16, 2011, Davis attended a Union meeting. During the meeting Larkins instructed Union members in attendance that they have the right to refuse to submit to a fitness for duty examination and to contact the Union if one is received. Davis questioned why Larkins instructed Davis to submit to the examination in September 2007. Larkins refused to answer Davis's question.

Discussion:

1. Timeliness of the Charge

As explained in the February 17, 2011 Warning Letter, Davis bears the burden of establishing that the charge is timely. In this case, Davis filed the original charge on September 3, 2010,

meaning that the statute of limitations extends back until March 3, 2010. The statute of limitations in duty of fair representation claims begins to run once the employee knew or should have known that further assistance from the Union was not likely. (*Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046.)

In this case, the majority of Davis's allegations concern events that occurred prior to March 3, 2010. This includes, but is not limited to, the allegation that the Union violated EERA by failing to represent her regarding (1) complaints she made about the District in May 2005 and June 2006; (2) the claim that the Union inadequately investigated one of its agents, Howard, in June 2006; (3) the non-specific statement that the Union did not assist her when she was placed on administrative leave in August 2007; (4) the claim that the Union assigned Howard to assist her in October 2009; and (5) the Union's advice regarding the fitness for duty examination in September 2007. Each of these instances occurred outside of the statute of limitations period and are therefore untimely.

Davis contends that her requests for Union assistance in May 2005 and June 2006 (item (1), listed above) should be considered timely because she did not discover until June 2010 that the Union did not ever file formal grievances pursuant to her requests. Rather, Davis contends that the Union sought to resolve her concerns with the District informally. However, as explained in the February 17, 2011 Warning Letter, the Union's decision not to pursue a grievance is not a breach of the duty of fair representation if the Union had a rational basis for its decision. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258 (*Collins*).) It was also explained that a union does not breach the duty of fair representation by pursuing employee concerns through informal processes so long as its decision is not arbitrary, discriminatory, or taken in bad faith. (*College of the Canyons Faculty Association (Lynn)* (2004) PERB Decision No. 1706; see also *California State Employees Association (Harris)* (2004) PERB Decision No. 1696-S.)

In this case, the mere fact that the Union attempted to resolve Davis's concerns through an informal process rather than through the formal grievance process does not establish a violation of the duty of fair representation. Accordingly, Davis's latent discovery that the Union pursued informal resolution of her concerns does not preserve the timeliness of her claim. Instead, as explained above, the statute of limitations begins to run when Davis knew or should have known that assistance from the Union was not forthcoming. (*Alvord Educator's Association (Bussman)*, *supra*, PERB Decision No. 2046.) Irrespective of the selected forum, Davis alleges that the Union took steps to represent her, but that the Union ceased assisting her on those matters in 2005 and 2006. Thus, Davis knew or should have known that further assistance from the Union was not forthcoming in 2005 and 2006, a time outside the statute of limitations period. These allegations are dismissed as untimely.[2]

[2] Even if these claims were timely, Davis does not establish that the Union's conduct was arbitrary, discriminatory, or taken in bad faith. (*Collins*, *supra*, PERB Decision No. 258.) Davis does not provide facts demonstrating whether the Union's actual representation was inadequate. The fact that Davis was not satisfied with the union's representation is not

Davis raises a similar argument with respect to her claim that the Union breached the duty of fair representation by advising her to submit to a fitness of duty examination in September 2007 (item (5), listed above). Once again, the Union's action took place outside of the statute of limitations period. Davis contends that this claim should be considered timely because, in February 2011, the Union instructed members, including Davis, to come to the Union prior to submitting to a fitness for duty examination. In *Charter Oak Unified School District (Bonner)* (2011) PERB Decision No. 2159 (*Bonner*), the Board found that the statute of limitations period "begins to run when a charging party discovers the conduct that constitutes the alleged unfair practice, not when the charging party discovers the legal significance of that conduct. (citing *Trustees of the California State University* (2009) PERB Decision No. 2038-H; *Compton Unified School District* (2009) PERB Decision No. 2016; emphasis in original.) In that case, after the statute of limitations period had concluded, the charging party discovered information that she believed supported her retaliation claim against her employer. The Board found that the statute of limitations period ran from the date the notice of unprofessional conduct was issued, not the date the charging party later discovered other evidence. (*Bonner*, *supra*, PERB Decision No. 2159.) In the present case, Davis alleges that the Union advised her to submit to a fitness for duty examination in September 2007. The Union's conduct in February 2011 does not preserve the timeliness of Davis's claim. Therefore, this allegation is dismissed.[3]

2. Duty of Fair Representation

Regarding Davis's one timely claim, Davis alleges that, on June 30, 2010, the Union breached the duty of fair representation by switching Union representatives during a mediation session with the District and by meeting with the District during the mediation outside of her presence. Davis raises two objections to the Union's conduct. Each of these claims will be discussed separately.

Davis continues to allege that it was unlawful for the Union to replace her representative, Walker, with another representative, Munguia, during the mediation. As explained in the

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sufficient to demonstrate a violation. (*Orange Unified Education Association & California Teachers Association (Rossmann)* (2003) PERB Decision No. 1533.)

[3] Even if this allegation were timely, Davis does not establish that the Union's conduct amounted to a breach of the duty of fair representation. Davis alleges that the Union treated her differently from other members but there is simply insufficient information support this conclusion. For example, Davis does not establish that her September 2007 situation was factually similar to the topic being discussed at the meeting. Moreover, Davis appears to have complied with the Union's advice, i.e., prior to submitting to the fitness for duty examination, Davis discussed the matter with a Union representative who advised her that, in her case, the examination was necessary. Davis does not demonstrate that any other member would have been treated differently under the same circumstances. For that reason, Davis does not establish that the Union acted arbitrarily, discriminatorily, or in bad faith. (*Collins*, *supra*, PERB Decision No. 258.)

February17, 2011 Warning Letter, the Union's selection of a representative in the mediation is an internal Union activity that is not subject to PERB review. (*American Federation of Teachers College Guild, Local 1521 (Saxton)* (1995) PERB Decision No. 1109.) In addition, there is insufficient information to conclude that the Union's decision to change representatives was arbitrary, discriminatory, or taken in bad faith. Thus, this claim does not provide a basis for finding a violation.

Davis also alleges that the Union breached its duty of fair representation by its conduct during the mediation. In *California School Employees Association & its Chapter 374 (Wyman)* (2007) PERB Decision No. 1903, the Board found no breach of the duty of fair representation where a union settled an employee's grievance without the employee's knowledge. The Board found that the employee still had the burden of showing that the union's conduct was arbitrary, discriminatory, or taken in bad faith. (*Ibid.*) Applying this holding to the present case, Davis does not specify the result of the mediation or the subject-matter of the Union's discussions with the District. Based on this information, PERB is unable to conclude that the Union's representation was arbitrary, discriminatory, or in bad faith. (*Collins*, *supra*, PERB Decision No. 258.) The mere fact that the Union met with the District without Davis does not demonstrate a violation.

Davis also contends that the Union demonstrated arbitrary conduct when Union representative Munguia stated to another representative, Walker, that Davis was unstable. In *Teamsters Local 137 (Illum and DeMuro)* (1995) PERB Order No. Ad-265, the Board found no violation where a union representative made disparaging remarks about the grievant, but continued to pursue the grievance. Similarly, in the present case, Munguia's statements about Davis, alone, are not sufficient to demonstrate a breach of the duty of fair representation. And, as explained above, Davis does not otherwise demonstrate that the Union's conduct was arbitrary, discriminatory, or in bad faith. Therefore, Davis's charge is dismissed.

3. Other Allegations

In the original charge, Davis alleged that the Union engaged in sexual harassment and violated EERA sections 3543.5, 3543.6(a) and 3543.6(d). Davis was informed in the February 17, 2011 Warning Letter that these claims did not state a prima facie case. Davis has not provided any other information supporting these allegations. Accordingly, these allegations are dismissed for the reasons explained in the February 17, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[4] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

[4] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

WENDI L. ROSS
Interim General Counsel

By _____
Eric J. Ca
Regional Attorney

Attachment

cc: Sonja Woodward

PUBLIC EMPLOYMENT RELATIONS BOARD

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February 17, 2011

Debra Davis

Re: *Debra Davis v. California School Employees Association & its Chapter 724*
Unfair Practice Charge No. LA-CO-1448-E
WARNING LETTER

Dear Ms. Davis:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 3, 2010. Debra Davis (Davis or Charging Party) alleges that the California School Employees Association & its Chapter 724 (Union or Respondent) violated section 3543.6(b) of the Educational Employment Relations Act (EERA or Act)[1] by breaching the duty of fair representation. Davis also alleges other violations by the Union.

Davis is employed at the San Diego Unified School District (District) and is a member of a bargaining unit exclusively represented by the Union. In June 2006, Davis requested representation from CSEA for an unspecified issue. Although not entirely clear, it appears as though Davis asked the Union to file a grievance on her behalf.

Davis then alleges that the Union:

> deliberately lied, deceived, misled, and personally sabotaged all individual efforts on [her] behalf, to gain justice for grievance issues over a period of 4 years.
>
> Ms. Munguia willfully misinformed me of the proper forms, policy and procedures in filing a grievance, and failed to properly represent me on issues that were vital to proving [sic] me relief. She also tried to dissuade fellow representatives from properly representing me by first attacking my character, stating that I was a troublemaker, mentally unstable, I stole from the district and unreliable.
>
> Finally, after her efforts to slander me failed, she then turned her attacks on those individuals who tried to assist me. By trying to

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

> use her position and power to take them not only off my case, but dismissing them from their appointed positions.

Davis also alleges that a Union representative sexually harassed her. In October 2009, the Union attempted to appoint the individual that Davis accused of sexual harassment to represent Davis in her grievance.

At a time not specified by the Davis, the Union appointed a new representative, Aminah Walker, to assist Davis with her grievance. Then, the Union appointed Labor Relations Representative Leticia Munguia to represent Davis.

Davis next alleges that "[t]hey were disruptive and uncooperative in both the preparation process, as well as in the actual hearing venue. On June 30, 2010, LRR Leticia Munguia was behind closed doors with mediator prior to Ms. Walker and my arrival."

Discussion:

1. Timeliness of the Charge

PERB Regulation 32615(a)(5)[2] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

In this case, Davis filed the instant unfair practice charge on September 3, 2010. This means that the statute of limitations extends back until March 3, 2010. Any allegations of wrongdoing occurring prior to March 3, 2010 are therefore untimely unless an exception to the

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

statute of limitations applies. The majority of the allegations raised by Davis in the charge concern events occurring either prior to March 3, 2010, or at unspecified times. There is insufficient information to conclude that such allegations are timely.

2. The Duty of Fair Representation

Davis alleges that the Union denied her the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Teachers Association (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

A union does not breach the duty of fair representation when it decides not to pursue a grievance to arbitration because of its determination that the grievance was unmeritorious. (*California Faculty Association (Wunder)* (2007) PERB Decision No. 1889-H.) Similarly, the decision not to pursue a grievance was not a violation of the duty of fair representation where the union had a history of compromising with the employer rather than confronting it. (*College of the Canyons Faculty Association (Lynn)* (2004) PERB Decision No. 1706.) The Board found no breach of the duty of fair representation where a grievance was reviewed by a screening committee and the union decided against pursuing it. (*Glendale Guild/AFT Local 2276 (Waszak)* (2009) PERB Decision No. 2003.)

In the present case, Davis alleges a series of misconduct by the Union dating back to June 2006. As explained above, Davis does not establish that any allegations of wrongdoing by the Union occurring prior to March 3, 2010 are timely. Even if these allegations were timely, however, Davis does not establish that the Union breached the duty of fair representation.

Davis alleges that the Union "misled" her and "sabotaged" her efforts to pursue a grievance and also that the Union "willfully misinformed" Davis about the process for filing a grievance. However, Davis does not provide a "clear and concise statement of facts" supporting these conclusions as required by PERB Regulation 32615(a)(5). Namely, Davis does not specify what action or inaction by the Union amounted to "sabotage" or other wrongdoing, or what statements demonstrate that the Union "willfully misinformed" Davis about the grievance process. In addition, Davis does not provide dates for this alleged conduct. Davis's mere conclusory remarks about the Union's conduct are not sufficient to demonstrate a violation. (*State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1071-S.)

Davis also alleges that the Union breached the duty of fair representation in October 2009, by attempting to assign her grievance to a Union representative that Davis accused of sexual harassment. The Union later removed another Union representative, Aminah Walker, that Davis apparently approved of. As explained above, Davis does not establish that these allegations are timely. Moreover, PERB has previously found that a union's selection of a grievance representative is an internal union matter that is not subject to the duty of fair representation. (*American Federation of Teachers College Guild, Local 1521 (Saxton)* (1995) PERB Decision No. 1109.) Accordingly, a union does not breach the duty of fair representation by not providing a grievant with the representative of his or her choice. (*Ibid.*) Applying this holding to the present case, the Union's selection of Davis's grievance representative was an internal Union matter not subject to review by PERB.

Davis also alleges that the Union breached the duty of fair representation during a mediation session occurring on June 30, 2010.[3] Davis alleges that Union representative Munguia attended a "behind closed doors" meeting with a mediator, presumably regarding Davis's

[3] This is the only allegation in Davis's charge where the timeliness is not called into question because the alleged events occurred within the statute of limitations period.

grievance. Davis does not provide any further information about the meeting or how Munguia's conduct affected either the mediation session or any other aspect of Davis's grievance. Thus, there is insufficient information to conclude the Union's handling of Davis's grievance was arbitrary, discriminatory, or in bad faith. (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.) Davis fails to "provide a clear and concise statement of facts" regarding this allegation. (PERB Regulation 32615(a)(5).)

3. Sexual Harassment

Davis also accuses the Union of sexual harassment. However, PERB lacks jurisdiction to address claims of sexual harassment. (*Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.)

4. Violations of Other Sections of EERA

Davis alleges that the Union violated EERA section 3543.5, which specifies the different circumstances under which a public school employer may violate EERA. EERA defines a public school employer as "the governing board of a school district, a school district, a county board of education, a county superintendent of schools, or a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code." (EERA, § 3540.1(k).) Davis does not provide facts demonstrating that the Union meets the EERA definition of a public school employer. Therefore, Davis does not establish that this section of EERA applies to the Union's conduct.

Davis also alleges that the Union violated section 3543.6(a). This section makes it unlawful for an employee organization to cause or attempt to cause a public school employer to violate EERA. Davis does not provide any information regarding the Union's interaction with the District or any other public school employer. Thus, Davis fails to provide a "clear and concise statement of facts" supporting this allegation as required by PERB Regulation 32615(a)(5) and Davis does not establish that the Union violated EERA section 3543.6(a).

Davis also alleges that the Union violated section 3543.6(c) and 3543.6(d). These sections concern an employee organization's conduct during either negotiations or impasse negotiations with a public school employer. Once again, Davis does not provide any facts regarding the Union's interaction with any public school employer. Moreover, PERB has previously found that individual employees lack standing to allege a violation of a union's duty to negotiate with a public school employer. (*SEIU Local 99 (Gutierrez)* (2007) PERB Decision No. 1899.) Accordingly, Davis lacks standing to allege a violation of these sections.

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the

explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before February 25, 2011,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Eric J. Cu
Regional Attorney

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charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)